No. 18703

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,

*Appellee,*

*vs.*

CRUZ YBARRA, HERMAN VASQUEZ, FRANK TORRES,

*Appellants.*

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## APPELLANTS' OPENING BRIEF.

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### Statement of Pleadings and Facts Disclosing Jurisdiction.

The District Court had jurisdiction under Title 18 U. S. C. 3231. This being a proceeding on an indictment filed January 3, 1963, in the United States District Court, Southern District of California, Central Division, under No. 31634 Criminal [C. T. 2].

The appellants were tried by the Court, sitting without a jury, and judgment was pronounced on March 18, 1963 [C. T. 35, 36, 37].

Notice of appeal was timely filed on March 18, 1963 [C. T. 39].

This court has jurisdiction to entertain this appeal and to review the judgment of the District Court pursuant to Title 28 U. S. C. Sections 1291 and 1294 (1).

## Statutes Involved.

*Title 18, Section 371, U. S. C.*

CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

*Title 21, Section 174, U. S. C.*

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under Section 7237 (c) of the Internal Revenue Code of 1954 [26 Section 7237 (c)]), the offender shall be imprisoned not less than ten or more than forty years and in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

For provision relating to sentencing probation, etc., see Section 7237 (d) of the Internal Revenue Code of 1954 [26 section 7237].

Whenever on trial for a violation of this subdivision, the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

## Statement of the Case.

The indictment in five counts charged the appellants as follows [C. T. 2]:

Count I, from October 31, 1962, until the return of the indictment, the appellants, Cruz Ybarra, Herman Vasquez, and Frank Torres conspired together to receive, conceal, transport and sell narcotics.

Count II, on October 31, 1962, the appellants Cruz Ybarra and Herman Vasquez received, concealed and transported narcotics.

Count III, on October 31, 1962, the appellants Cruz Ybarra, and Herman Vasquez sold narcotics.

Count IV, on November 6, 1962, the appellants Cruz Ybarra, Herman Vasquez and Frank Torres received, concealed, and transported narcotics.

Count V, on November 6, 1962, the appellants Cruz Ybarra, Herman Vasquez and Frank Torres sold narcotics.

Appellant, Cruz Ybarra, was found guilty on all counts [C. T. 35].

Appellant, Herman Vasquez, was found guilty on Counts I, II, and III, and not guilty on Counts IV and V [C. T. 36].

Appellant, Frank Torres, was found guilty of Counts I, IV and V [C. T. 37].

Appellants moved for judgment of acquittal at the close of the government's case in chief, and at the close of all the evidence [R. T. 239 and 354].

Judgment was entered on March 18, 1963 [C. T. 35, 36, 37].

Notice of appeal, filed March 18, 1963 [C. T. 39].

## Statement of the Facts.

Date of Event—October 29, 1962:

Joseph Baca testified he accompanied a special employee, Ronald Varela to a location where Cruz Ybarra and Mr. Varela met [R. T. 13]. No conversation overheard [R. T. 21, 22].

Date of Event—October 30, 1962:

Joseph Baca testified he accompanied Mr. Varela to a location where Mr. Varela, Cruz Ybarra, and Frank Torres met [R. T. 18].

Date of Event—October 31, 1962:

Penn Weldon testified he searched and gave money to Mr. Varela. Mr. Varela was seen meeting Mr.

Ybarra and also Mr. Vasquez. Mr. Varela was later seen on a motor bike with Mr. Vasquez and Mr. Ybarra walking on a street [R. T. 28]. Mr. Weldon, pursuant to a radio message approximately ten minutes later, met Mr. Varela who handed him narcotics [R. T. 29].

Peter Niblo testified he observed Mr. Varela and another person ride away on a motor bike until they disappeared from view [R. T. 69].

Date of Event—November 6, 1962:

Richard D. Rock observed Mr. Ybarra and Mr. Varela drive away and then lost sight of them [R. T. 108, 120].

Francis L. Briggs observed Mr. Varela meet with Mr. Ybarra and lost sight of them. Subsequently he met with Mr. Varela who handed him a package containing narcotics [R. T. 193, 211].

Date of Event—November 12, 1962:

Joseph Baca drove Mr. Varela to a location at which time Mr. Varela was wearing a recording device.

Penn Weldon testified he overheard a conversation over a receiver involving two voices, of which he could identify only Mr. Varela's [R. T. 32].

Raymond Velasquez overheard conversation [R. T. 160], and could identify only Mr. Varela's voice [R. T. 161].

Francis L. Briggs testified he overheard conversation [R. T. 195], and could not identify the voice at that time, but heard it again on November 16, 1962 and December 15, 1962.

Substance of Conversation of November 12, 1962:

Mr. Varela addressed another as "Shorty", who stated a meeting was not for tonight, but tomorrow. A number system was suggested to avoid confusion. Discussion about handling a large amount of money was suggested and replied to by the term "crazy". Will this transaction go like the last one, was asked, and was answered, it will be different. It was stated that no-one is to see us or no deal. Mr. Varela stated he did not want to purchase any narcotics at this time. A discussion continued about being careful.

Date of Event—November 13, 1962:

Penn Weldon testified he drove Mr. Varela to a location and later saw Mr. Ybarra walking away. Although Mr. Varela had on a Fargo device, no conversations were overheard [R. T. 36, 37].

Date of Event—November 14, 1962:

Penn Weldon testified he transported Mr. Varela to a location and observed Mr. Varela ride off on a motor bike with Mr. Vasquez, but lost sight of him [R. T. 37]. Although a Fargo device was worn by Mr. Varela there were no conversations overheard [R. T. 54].

Peter Niblo observed Mr. Varela drive away with another person and lost them from view [R. T. 75].

Richard Rock observed Mr. Varela drive away with another person and lost them from view [R. T. 110].

Dennis Cook observed two persons on a motor bike and lost sight of said persons [R. T. 138, 139].

Date of Event—November 16, 1962:

Penn Weldon, Peter Niblo and Richard Rock observed all three appellants in alley with Mr. Varela, but no conversation overheard.

Dennis Cook overheard conversation by receiver from Fargo device between two voices and one word by a third party [R. T. 141]. He could identify Varela's voice only [R. T. 142].

Raymond Velasquez overheard conversation including three voices but could not identify any except Mr. Varela [R. T. 164].

Francis Briggs overheard conversation and related by testimony, substance wherein two persons were engaged [R. T. 203-207], but later testified he heard four voices [R. T. 215].

Substance of Conversation of November 16, 1962:

Mr. Varela stated he did not have a radio on him. Mr. Varela expected to have large amount of money and was seeking to buy heroin. Mr. Varela was referring to a party as Hank. A price was suggested and Mr. Varela stated it was excessive. It could be cheaper on the other side of the border if desired, but Mr. Varela rejected this idea, and was told that is the only way for a cheaper price.

Mr. Varela stated he would advise how we will do it and was answered in the negative, that it would be told to him.

The conversation continued concerning a future meeting in two weeks.

Mr. Varela stated he would like a lower price and was answered by another person, if any available, he would purchase it. A discussion of trust in each other followed with the statement that, I told Homer to go ahead and give it to you the first time. A third voice said, "Yeah".

Date of Event—November 30, 1962:

Francis Briggs testified he returned to location with Mr. Varela but did not see any of the appellants [R. T. 208].

Date of Event—December 16, 1962:

Francis Briggs spoke to Frank Torres and recognized his voice [R. T. 202].

## Specifications of Errors.

The evidence is insufficient to sustain conviction of guilt, in that there is not a sufficient showing of the existence of any conspiracy between the appellants.

The evidence furthermore is insufficient in proof of;

1. A sale of narcotics on October 31, 1962;
2. A sale of narcotic on November 6, 1962;
3. Possession of narcotics with knowledge of illegal importation in the appellants on October 31, 1962;
4. Possession of narcotics with knowledge of illegal importation in the appellants on November 6, 1962.

## ARGUMENT.

The evidence discloses that Ronald Varela, had been seen with Mr. Ybarra and Mr. Vasquez on October 31, 1962. Mr. Varela disappeared from the view of observing narcotic agents and at a subsequent time delivers a narcotic to the narcotic agents.

Upon this fact we are to conclude that a sale or delivery had been made to Mr. Varela, without the benefit of testimony from Mr. Varela nor by the observance of such fact by the narcotic agents.

There is nothing to indicate that one or the other delivered any narcotics to Mr. Varela or that he acquired it from some unknown source during his absence.

The fact that a subsequent conversation indicated that "Homer gave it to you the first time" does not necessarily indicate this was on October 31, 1962.

It is further argued that the record is bare of any accurate indentification of "Homer".

The evidence in respect to the sale on November 6, 1962, is predicated on the same fact situation. Mr. Varela was seen with Mr. Ybarra and after an absence of observance by the narcotic agents delivers to them a narcotic.

The assumption requested by such a circumstance is that it was obtained from the person last seen with irrespective of any possible intervention by another person or act.

It should be noted that no conversations were overheard on these two dates and the sale transactions themselves rest on the above facts. Subsequent conversa-

tions do not directly refer to the specific narcotic involved, nor to any specific date nor accurately described person.

The argument is based upon the same premise in respect to possession of unlawfully imported narcotics. The circumstantial evidence is without substantial proof to shift the burden of explanation as to its illegal importation.

Although it has been held by this respectful court that possession may be established by circumstantial evidence, such evidence must be of a sufficient nature, and thus not establish a presumption of possession upon which to place the burden of explanation on the appellants.

*United States v. Landry,* 257 F. 2d 425;

*United States v. Ross,* 92 U. S. 281, 23 L. Ed. 707.

It is also an evidentiary rule by State in California Code of Civil Procedure, Sections 1957-1960.

The provision which raises a presumption of guilt from the fact of unexplained possession, and thereby in effect shifts the burden of proof to a defendant, is drastic, no doubt designed to meet a menacing situation. Congress has created a presumption upon proof of the existence of a fact, and now the government would have the Court presume the fact. *United States v. Landry,* 257 F. 2d 425.

The circumstantial evidence of sale and possession on October 31, 1962, and November 6, 1962, is the mere association of Mr. Ybarra, Mr. Vasquez and Mr. Varela. Note: Mr. Vasquez was found not guilty of the

November 6, 1962, sale. Any subsequent conversations were not sufficiently connected with these charges of sale and possession by specification.

. . . mere similarity of conduct among various persons and the fact they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy.

> Jury instructions and forms for Federal Criminal cases by the Honorable William C. Mathes; instructions number 1304.

The fact that the appellants had been seen on occasion together assembled is in itself insufficient to establish a conspiracy.

The evidence does not disclose any agreement, offense-object toward which agreement is directed as necessary elements of the offense of conspiracy.

*United States v. Guterma,* 189 F. Supp. 265.

Although Mr. Ybarra and Mr. Vasquez had been seen together and were allegedly present at a conversation on November 16, 1962, the facts by their own acts do not sufficiently establish any acknowledgment of an agreement. The evidence does not establish sufficiently that Mr. Vasquez had indulged in any conversation or if he did what he had said; without knowledge, intent to participate in an established conspiracy cannot exist.

*Dennis v. United States,* 302 F. 2d 5.

Since the evidence does not establish that the narcotics specified in the sale of October 31, 1962, and November 6, 1962, were in the possession or under

the control of the three appellants there is not a sufficient showing that they had knowledge of its illegal importation.

*United States v. Mills,* C. A. Pa. 1961, 293 F. 2d 689.

"To possess means to have actual control, care and management of, and not a passing control, fleeting and shadowy in its nature."

*United States v. Landry,* 257 F. 2d 425 citing; *United States v. Wainer,* 170 F. 2d 603, 606.

To render evidence of the acts or declarations of an alleged conspirator admissible against an alleged co-conspirator, the existence of the conspiracy must be shown and the connection of the latter therewith established by independent evidence. The existence of the conspiracy cannot be established against an alleged conspirator by evidence of acts or declarations of his alleged co-conspirators, done or made in his absence. *Glover v. United States,* 306 F. 2d 594. Citing *Bartlett v. United States,* 166 F. 2d 920, 925; *Tripp v. United States,* 295 F. 2d 418, 422; *Glasser v. United States,* 315 U. S. 60.

Appellants contend there was not a sufficient independent showing of an established conspiracy and the acts or declarations of an alleged conspirator would not be admissible against an alleged co-conspirator.

The facts disclose that the conversation of November 16, 1962, do not specifically refer to any transaction of October 31, 1962, or November 6, 1962, and thus could not establish proof of an existing conspiracy. Appellants contend that if such conversation existed to the satisfaction of this Court, it was in substance

to possible future conduct, and without any act committed in furtherance thereof would not suffice in proof and evidence to sustain a conviction therefor. . . . Not shown that conspiracy with respect to narcotic drugs involved specific heroin referred to in substantive charges proof that one defendant engaged in such conspiracy would not have warranted his conviction of substantive counts. . . .

Guilt of conspiracy may not be inferred from mere association.

A suspicion, however strong, is not proof, and will not serve in lieu of proof.

The prosecution for unlawful concealment, transportation and sale of 2 ounces of heroin and for conspiracy to conceal, sell, dispense and distribute quantities of narcotic drugs, evidence did not support finding that defendant or alleged co-conspirator was involved in any conspiracy involving the 2 ounces of heroin referred to in substantive counts and did not support conviction of such defendant on the substantive counts. *Evans v. United States,* 257 F. 2d 121.

Evidence as to conversation heard by means of portable radio transmitting and receiving sets should be treated with considerably greater caution than evidence arising from telephone conversation. . . .

*United States v. Sansone,* 231 F. 2d 887.

The evidence appears to be in direct conflict in relation to testimony given by the narcotic agents in reference to the conversation of November 16, 1962.

Dennis Cook testified he overheard the "substance" of the conversation between two voices and one word

by a third person [R. T. 141] but could identify the voice of Mr. Varela only [R. T. 142].

Raymond Velasquez testified substantially to the same fact [R. T. 164].

Francis Briggs related a conversation overheard that in substance was between two persons, but later testifiled there were four voices [R. T. 215].

The identification was made of Mr. Torres' voice based on a subsequent conversation approximately one month later [R. T. 202]. The fact that he had not seen Mr. Torres at the location prior to the conversation nor had personal knowledge at the time of the conversation of Mr. Torres' presence, nor had ever conversed with or listened to the voice of Mr. Torres create a situation of extreme delicacy in asserting a position that he could recognize the voice one month later. In considering this with caution, human frailties and disabilities cannot be ignored, and appellants contend that such fact is open to extreme and careful scrutiny, especially in the light of a circumstance that this was relied upon the Government.

## Conclusion.

Appellants respectfully submit that the evidence is insufficient to sustain a conviction and respectfully prays that the judgment be reversed.

Respectfully submitted,

Beecher S. Stowe, and
Norman J. Kaplan,
By Norman J. Kaplan,
*Attorneys for Appellants.*

## Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

NORMAN J. KAPLAN

## APPENDIX.

### Exhibit Index.

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